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Building, Concrete, Excavating & Common Laborers Union, Local 731 of Greater New York, Long Island and Vicinity, Laborers International Union of North America and Tully Construction Co., Inc. and Local 15, International Union of Operating Engineers, AFL-CIO and Plumbers Local Union # 1 of the United Association of Journey-men and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. Case 29-CD-601

February 15, 2008

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN AND SCHAMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Tully Construction Co., Inc. (the Employer) filed a charge on July 5, 2007,¹ alleging that the Respondent, Building, Concrete, Excavating & Common Laborers Union, Local 731 of Greater New York, Long Island and Vicinity, Laborers International Union of North America (Laborers), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees the Laborers represents rather than to employees represented by Plumbers Union Local #1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Plumbers). A hearing was held on September 24 and October 9 before Hearing Officer James P. Kearns. Initially, Local 15, International Union of Operating Engineers, AFL-CIO (Engineers) was not a party to this matter and did not receive a Notice of Hearing. After the hearing commenced and the Plumbers took the position that it had jurisdiction over part of the disputed work that was being performed by Engineers-represented employees, the hearing was adjourned and the Engineers was given an opportunity to intervene in this matter. When the hearing resumed, the Engineers intervened and fully participated in the proceeding. After the hearing was completed, the Employer, the Engineers, and the Plumbers filed posthearing briefs.²

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial

error. On the entire record, the Board makes the following findings.³

I. JURISDICTION

The Employer, a New York corporation, is engaged in the business of providing general construction services. During the 12-month period preceding the hearing, a representative period, the Employer, in conducting its business, purchased and received goods valued in excess of \$50,000 directly from points located outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers, the Engineers, and the Plumbers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The parties stipulated that the Employer has at all material times been a subcontractor performing work at the Fresh Kills landfill in Staten Island, New York. A portion of the work being done by the Employer at the jobsite includes the installation and fusing of high density polyethylene (HDPE) pipe for the removal of methane gas. The parties stipulated that this is the work in dispute. The parties also stipulated that the Employer is signatory to a collective-bargaining agreement with the Laborers, which is effective from July 1, 2006 to June 30, 2012, to a collective-bargaining agreement with the Engineers, which is effective from July 1, 2006 to June 30, 2010, and to a collective-bargaining agreement with the Plumbers, which is effective from July 1, 2004 to June 30, 2007.

In either late March or early April, the Employer assigned the work of installing and fusing the polyethylene pipe to a composite crew consisting of employees represented by the Laborers and employees represented by the Engineers.

Before the assignment of work was made, Thomas Kempf, business agent for the Plumbers, approached Edward Segali, the Employer's project manager, at the Fresh Kills jobsite. Segali and Kempf discussed the possibility of adding a Plumbers-represented employee to the crew to operate the fusion welding machine. Segali testified that the assignment of the disputed work was

¹ Unless otherwise indicated, all dates refer to 2007.

² The Laborers did not file a posthearing brief.

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

made after the Employer reviewed its respective collective-bargaining agreements with each Union and determined that it was contractually obligated to assign the work to employees represented by the Engineers and the Laborers.

Segali testified that the fusing work is currently being performed by one Laborers-represented employee and one or two Engineers-represented employees. An Engineers-represented employee is primarily responsible for maintaining the fusion machine and operating that machine to fuse together sections of pipe. The Laborers-represented employee assists the operator by placing pipe into the fusion machine, removing the fused pipes, preparing the trench to receive the pipe, placing the pipe into the trench, backfilling the trench, and compacting the soil around the pipe.

For larger pieces of pipe, the Laborers-represented employee works in conjunction with a second Engineers-represented employee. The latter operates heavy equipment to move the pipe to the machine for fusing, to remove the fused sections of pipe from the machine for installation in the trench, and to dig the trench. The Laborers-represented employee directs the operator of the heavy equipment in placing the pipe in the trench and manually assists in backfilling ditches created by the heavy equipment.

From time to time, the Laborers-represented employee may operate the fusion machine if the Engineers-represented employee is not immediately available. The Laborers-represented employee may also operate a small, hand-operated fusion machine that is used for small diameter pipe. Segali testified that if a Plumbers-represented employee were to be added to the current crew for the purpose of performing the fusing operation, the Engineers-represented employee would still be responsible for the maintenance and repair of the fusion machine. Also, the Laborers-represented employee would still perform the manual work related to placing the pipe in the fusion machine, removing the pipe from the machine, placing it in the trench, backfilling, and compacting the soil.

In May, the Laborers and the Plumbers separately filed for arbitration under their collective-bargaining agreements, laying claim to the disputed work. On May 23 and 24, respectively, each received a decision in its favor. In light of these decisions, on July 2 the Employer's attorney wrote the Laborers' attorney, referencing the competing arbitration awards, and asking whether the Laborers would agree to an assignment of all or part of the disputed work to the Plumbers-represented employees. On July 3, the Laborers' attorney warned the Employer that if it reassigned the disputed work to the

Plumbers-represented employees, the Laborers would engage in a work stoppage and picket at the jobsite.

B. Work in Dispute

Consistent with the parties' stipulation, the notice of hearing describes the work in dispute as follows:

The installation and fusing of high density polyethylene pipe for removal of methane gas from capped landfills at landfills 6 and 7 of the Fresh Kills landfill in Staten Island, New York.

C. Contentions of the Parties

The Employer contends that there are competing claims to the work, and that there is reasonable cause to believe that the Laborers violated Section 8(b)(4)(D) of the Act because that union threatened economic action if the Employer reassigned any part of the work being performed by employees it represents to employees represented by the Plumbers.

The Employer asserts, and the parties stipulated, that there is no agreed-upon method of resolving the dispute. While the Engineers and the Plumbers are parties to such an agreement, the New York joint plan, the Laborers is not.

On the merits, the Employer asserts that the disputed work should be awarded to employees represented by the Laborers and the Engineers based on collective-bargaining agreements, the Employer's current assignment of the work, preference, and past practice, relative skills and training, and economy and efficiency of operations.

The Engineers contends that the work was properly and appropriately assigned by the Employer to its employees represented by the Engineers and the Laborers. The Engineers urges the Board to uphold the assignment based on the collective-bargaining agreements, the Employer's current assignment of the work, preference and past practice, economy and efficiency of operations, area and industry practice, and relative skills and training.

The Plumbers contends that the collective-bargaining agreements, area and industry practice, relative skills, economy and efficiency of operations, and the Employer's past practice weigh in favor of assigning the disputed work to employees it represents. The Plumbers also contends that the Employer's preference is unreasonable and should not be accorded any weight.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that there are

competing claims to disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim. In addition, the Board must find that the parties have not agreed upon a method for voluntary adjustment of the dispute. See, e.g., *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1031 fn. 2 (2004).

1. Competing claims for the work in dispute

The parties do not dispute that there are competing claims for the work. At all times, the Engineers, the Laborers, and the Plumbers have claimed this work for employees represented by their respective Unions. Further, the Laborers and the Plumbers expressly claimed the disputed work by separately taking this matter to arbitration under their respective collective-bargaining agreements. Both Unions received favorable arbitration decisions. Accordingly, there is reasonable cause to believe that there are competing claims to the disputed work. See *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1097 (2003).

2. Use of proscribed means

The parties do not dispute that there is reasonable cause to believe that a party used proscribed means to enforce its claim to the work. The parties stipulated that the Laborers, through its attorney, threatened to engage in a work stoppage and picket the jobsite if the work were reassigned to employees represented by the Plumbers. It is well established that such a threat establishes reasonable cause to believe that the Laborers used proscribed means to enforce its claim to the work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB No. 33, slip op. at 3 (2006); *Cretex*, supra, 343 NLRB at 1032; *Laborers Local 1359 (Krall's Masonry)*, 281 NLRB 1034, 1035 (1986).

3. No agreed-upon method for voluntary resolution of dispute

The parties stipulated, and we find, that there was no agreed-upon method for the voluntary resolution of this dispute that would bind all parties.

For these reasons, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular

case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making a determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of a Board certification concerning the employees involved in the dispute. The Employer is signatory to separate collective-bargaining agreements with all three Unions. The Laborers' collective-bargaining agreement contains specific language which covers "the fusing and joining of all plastic pipe" and also covers "installing, handling, loading, unloading, placing, hooking, unhooking, lowering into ditch, aligning, leveling, and jointing of corrugated pipe, concrete pipe, plastic pipe." The Engineers' collective-bargaining agreement covers the "handling, installation, jointing, coupling of all permanent steel and plastic pipe as customarily performed by Local 15" as well as the work of "installing, repairing, maintaining, dismantling" all equipment including "fusion coupling machines."

The Plumbers' collective-bargaining agreement provides that "all piping and equipment for natural and manufactured gas" shall be performed exclusively by Plumbers-represented employees. It also provides that:

all piping pertaining to plumbing including plain end I.P.S. sleeves shall be handled, cut threaded, joined, fabricated, etc. and installed by Local No. 1 Journeymen and Apprentices . . . and [w]elding and/burning pertaining to plumbing . . . shall be done on the job or in the shop by Journeymen members of Local Union No. 1.

When questioned at the hearing the Plumbers' agent, Kempf, testified that although there is no reference to the "fusing" of pipe "in particular" in the Plumbers' collective-bargaining agreement, the agreement does generally refer to "all welding and pipe".

Although the language of the Plumbers' collective-bargaining agreement arguably covers the work in dispute, the language of the Laborers' and the Engineers' collective-bargaining agreements specifically claims such work. Accordingly, we find that the factor of collective-bargaining agreements slightly favors an award to employees represented by the Laborers and the Engineers.

2. Employer preference, assignment, and past practice

The Employer's representative, Segali, stated that the Employer prefers to assign the work in dispute to employees represented by the Engineers and the Laborers, and has assigned the work to its employees represented by those unions.

The Employer presented evidence that, in the past, it has used Engineers-represented employees, and not Plumbers-represented employees, to perform fusion welding on its projects. Segali testified that on the eight landfill projects involving the fusion and installation of HDPE pipe where he was the Employer's project superintendent, such work was performed by a team of Laborers-represented employees and Engineers-represented employees but not Plumbers-represented employees. Segali stated that the Employer employed a Plumbers-represented employee on a 1996–2001 slurry wall project at Fresh Kills, but further testified that this employee worked with flanged connections. When asked whether there was a Plumbers-represented employee on the fusion and installation crew at that project, he replied that there was a “plumber on that operation.” It is unclear from the record whether he was referring to the entire slurry wall operation or simply the fusion and installation portion of the operation.

James Bushey, an Engineers-represented employee who was hired by the Employer to operate and maintain a fusion welding machine for 6 months on the slurry wall project, testified that the Plumbers-represented employee employed on that project spent his time working in a manhole and never assisted with the plastic fusion portion of the work. However, the Plumbers' agent, Kempf, testified that Plumbers-represented employees did perform fusion welding on the slurry wall project. Kempf stated that while he had no personal knowledge of this, he was told this by Plumbers-represented employees who worked on that project. We find that, even if there was a Plumbers-represented employee on the slurry wall project performing the plastic fusion work, this sole exception does not outweigh the Employer's stated preference, current assignment, and the remainder of its past practice. *Elevator Constructors Local 2 (Kone, Inc.)* 349 NLRB No. 112, slip op. at 4 (2007).

Accordingly, the factors of employer preference, current assignment, and past practice favor an award to employees represented by the Laborers and the Engineers.

3. Area and industry practice

James Bushey, the Employer's Engineer-represented employee, testified that he has been performing fusion welding on plastic piping since 1988 in the Bronx, Westchester, and Manhattan, and has performed such work inside property lines, without challenge, utilizing and operating the fusion welding machine. John Pedone, a maintenance foreman and member of the Engineers, testified that he worked for approximately 3 years, starting in 2001, on a project at the Pennsylvania Avenue Landfill in Brooklyn where HDPE pipe was joined using a fusion welding machine and installed in a gas extraction

system. On that job, he observed an Engineers-represented employee operate the fusion welding machine on a daily basis to fuse plastic pipe. There was no Plumbers-represented employee on the crew, and there were no jurisdictional disputes over running the fusion machine.

Richard Dougherty, a member of the Laborers, testified that in 1996, for about a year and a half, he worked on a project at the Edgemere landfill in Queens which required the fusion and installation of plastic pipe used to extract gas from the landfill. He worked with an Engineers-represented employee, who ran the fusion machine. No Plumbers-represented employees worked on the crew fusing HDPE.

Employees represented by the Plumbers, in combination crews with one Laborers-represented employee and one Engineers-represented employee, performed fusion welding and installation of HDPE pipe at the Fresh Kills Landfill from 1994–1995 in sections 3/4 for a contractor, Patosa Bros., and from 1995–1996 in sections 2/8 for a subcontractor, Frederick Harris, and a general contractor, Interstate. At the time of the hearing, composite crews of Plumbers-represented employees, Laborers-represented employees, and Engineers-represented employees were still performing maintenance work for G.D. Barry, a subcontractor, and Shaw, a general contractor, on sections 3/4 and 2/8. That work required the Plumbers-represented employee on the crew to fuse HDPE pipe. The Plumbers' agent, Kempf, testified that, in 1991, Plumbers-represented employees performed HDPE pipe fusion in connection with the installation of gas extraction systems at Oak Beach and Port Richmond sewage plants in Staten Island.

Because the evidence shows that employees represented by the Engineers, the Laborers, and the Plumbers perform work of the type in dispute here, we find that the factor of area and industry practice does not favor an award of the disputed work to employees represented by any of the Unions.

4. Relative skills and training

Segali testified that the employees represented by the Engineers and the Laborers, who are currently performing the disputed work at the Fresh Kills landfill project, are certified by the manufacturer of the HDPE pipe to do such fusion work. Segali testified that the Employer is satisfied with the work already done and that all of the HDPE pipe welds made by Engineers-represented employees and Laborers-represented employees already on the job have passed inspection and pressure testing.

Kempf testified that Plumbers-represented employees are also certified to weld pipe using a fusion machine and spend 85 to 90 percent of their 5-year apprenticeship performing piping work. Although the Plumbers con-

tends that the disputed work is a key aspect of the trade of Plumbers-represented employees, it has not offered any evidence to show that Engineers-represented employees are unqualified to perform the disputed work. See *Sheet Metal Workers Local 19 (E.P. Donnelly, Inc.)*, 345 NLRB 960 (2005) (despite assertion that disputed work was “cornerstone task” and evidence of in-depth training presented by contesting union, the Board held that this factor favored none as members of both groups were sufficiently trained to meet demands of work in dispute).

On this record, we find that employees represented by the Engineers, the Laborers, and the Plumbers have the skills and training necessary to perform the work in question. Accordingly, the factors of relative skills and training do not favor an award to employees represented by any of the Unions.

5. Economy and efficiency of operations

The Employer asserts that it is more economical and cost efficient to assign the disputed work to Laborers-represented and Engineers-represented employees than to employees represented by the Plumbers. According to the Employer, the current crew of Laborers-represented and Engineers-represented employees can perform all the disputed work, but assigning the work to Plumbers-represented employees would require the use of an additional employee and thereby increase the Employer’s labor costs. In this regard, the Employer contends that if the fusion welding work were awarded to employees represented by the Plumbers, the Employer would still need to employ a Laborers-represented employee to move the pipe; perform the trenching work, the backfilling work, and the soil compaction; and to direct the heavy equipment operator in moving sections of pipe and placing them in the trenches. The Employer also argues that it would still need one Engineers-represented employee to maintain and repair the fusion machine, and another Engineers-represented employee on an “as-needed” basis to operate heavy equipment.

Plumbers’ agent Kempf conceded at the hearing that an Engineers-represented employee would be the proper person to perform maintenance and repair work on the fusion machine. However, the Plumbers claims that the Employer also could utilize that single Engineers-represented employee to run the heavy equipment on an “as needed” basis instead of employing a second Engineers-represented employee to do so. As a result, the Plumbers argues, the Employer could then hire a Plumbers-represented employee and still maintain a three-member crew, a move that would allegedly save money because Plumbers-represented employees are paid less than Engineers-represented employees.

We reject the Plumbers’ contentions. First, the Plumbers’ cost-savings argument appears to be based in part on the difference in wage rates between the two groups of employees (\$110 per hour for the Plumbers vs. \$115 per hour for the Engineers). However, the Board does not consider wage differentials as a basis for awarding disputed work. *Longshoremen ILA Local 1242 (Rail Distribution Center)*, 310 NLRB 1, 5 fn. 4 (1993). Moreover, no evidence establishes that a single Engineers-represented employee could, in fact, perform the additional “as needed” work on the heavy equipment. The evidence does reflect, however, that the Plumbers-represented employee could do only a small portion of the work (i.e., the work in dispute) performed by the Laborers and Engineers-represented employees. Consequently, the Plumbers-represented employee would spend a substantial amount of time doing nothing between fusing operations.⁴

In the above circumstances, we find that the factors of economy and efficiency of operations favors awarding the disputed work to employees represented by the Laborers and the Engineers.

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by the Laborers and the Engineers are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers and Engineers, not to those labor organizations or to their members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Tully Construction Co, Inc., represented by the Building, Concrete, Excavating & Common Laborers Union, Local 731 of Greater New York, Long Island and Vicinity, Laborers International Union of North America, and by Local 15, International Union of Operating Engineers, AFL–CIO, are entitled to perform

⁴ Kempf testified that the Plumbers-represented employees could also physically place the pipe into the fusion machine, or rig the large pipe to the backhoe so that it could be placed in the fusion machine. However, the Laborers-represented employees, who are currently performing the work of lifting and rigging the pipe, would still be on the crew even if the Plumbers-represented employees were awarded the work in dispute. Thus, it does not appear that any willingness on the part of the Plumbers-represented employees to move the pipe would increase the economy and efficiency of operations.

all work involved in the installation and fusing of high density polyethylene pipe for removal of methane gas from capped landfills at landfills 6 and 7 of the Fresh Kills landfill in Staten Island, New York.

Dated, Washington, D.C. February 15, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD